IN THE

Supreme Court of the United States

No. 73-5615

October Term, 1973

DOMINICK CODISPOTI and HERBERT LANGNES,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Opinion Below

The Opinion of the Supreme Court of Pennsylvania is officially reported at 453 Pa. 619, 306 A.2d 294 (1973).

Jurisdiction

Respondent agrees that jurisdiction is vested in your Honorable Court under 28 U.S.C. § 1257 (3).

Constitutional Provisions and Statutes Involved

1. Article III, Section 2, of the Constitution of the United States:

   "The trial of all crimes, except in cases of impeachment shall be by jury . . ."

2. Amendment VI to the Constitution of the United States:

   "In all criminal prosecutions, the accused shall enjoy the right to a speedy and just trial by an impartial jury . . ."

3. Amendment Fourteen to the Constitution of the United States:

   "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Pennsylvania Contempt Statutes—Act of 1836, June 16, P.L. 784, § 23, 24, 17 P.S. § 2041, 2042.

   CLASSIFICATION OF PENAL CONTEMPTS.

   The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases, to-wit:

   I. To the official misconduct of the officers of such courts respectively;

   II. To disobedience or neglect by officers, parties, jurors, or witnesses of or to the lawful process of the court;

   III. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice. 1836, June 16, P.L. 784, § 23.

PUNISHMENT FOR CONTEMPT.

The punishment of imprisonment for contempt as aforesaid shall extend only to such contempts as shall be committed in open court, and all other contempts shall be punished by fine only. 1836, June 16, P. L. 784, § 24.

Questions Presented

1. Whether the total effective sentence received must be used rather than the individual sentences in order to determine the seriousness of the contempts and thereby determine the right to jury trial when the sentences for direct contempt of court are imposed at the end of a trial?

2. Whether the strong possibility of a substantial term of imprisonment requires that an accused be afforded the right to a jury trial?

Statement of the Case

A. The Circumstances of the Contempt Citations.

Petitioners, along with co-defendant Richard O. J. Mayberry, were indicted at No. 4672 of 1965 in the Criminal Courts of Allegheny County, Pennsylvania, on counts of: 1) Holding Hostages in a Penal Institution, and 2) Prison Breach. Pleas of not guilty were entered and trial commenced on November 10, 1966, before the Honorable Albert A. Fiok and a jury. After waiving their respective rights to counsel, petitioners acted as their own counsel although court-appointed counsel advised them throughout the trial. On December 9, 1966, the jury returned a verdict of guilty as to both counts of the indictment as to all of the defendants. At the conclusion of the trial, Judge Fiok also sentenced petitioners and co-defendant Mayberry for several acts of criminal contempt occurring at various times during

the twenty-two day trial. Petitioner Codispoti was sentenced on seven separate citations to terms of one to two years on each citation. Petitioner Langnes was sentenced on six separate citations to terms of one to two years on each citation.

B. The State Court Appeal.

Co-defendant Mayberry and petitioners appealed their contempt convictions to the Supreme Court of Pennsylvania. After oral argument on November 12, 1968, the Supreme Court of Pennsylvania affirmed the sentence of the lower court. *Commonwealth v. Mayberry,* 434 Pa. 478, 255 A.2d 131 (1969).

C. The Appeal to the United States Supreme Court.

On April 8, 1970, your Honorable Court granted co-defendant Mayberry's *"pro se"* Petition for Writ of Certiorari. Mayberry contended: (1) that he was entitled to a a nonsummary court trial or at least a hearing on the sentence; (2) that his right to counsel had been violated; (3) that under the circumstances he was entitled to have his criminal contempt charges heard by a judge other than the one who presided over his trial; (4) that the Pennsylvania Criminal Contempt Statute was unconstitutionally vague; (5) that his sentence of 11 to 22 years constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.

On January 20, 1971, in an Opinion and Order by Justice Douglas, this Court vacated the judgment of the lower court and remanded the case for further proceedings. The Opinion contained the following:

> Our conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a pub-

lic trial before a judge other than the one reviled by the contemnor. See *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682. In the present case that requirement can be satisfied only if the judgment of contempt is vacated so that on remand another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record.

Vacated and remanded. *Mayberry v. Pennsylvania*, 400 U. S. 455, 466, 91 S. Ct. 499, 505 (1971).

D. Proceedings on Remand to the Court of Common Pleas of Allegheny County, Pennsylvania.

In compliance with the Opinion of the United States Supreme Court, trials were held before the Honorable Robert Van der Voort, Presiding Judge, for each of the petitioners individually on their respective contempt citations. Each of the petitioners chose to represent themselves but were advised by Fred E. Baxter, Jr., Esquire, Assistant Public Defender. Each of the petitioners was allowed to cross examine prosecution witnesses and present testimony in their own defense.

Petitioner Codispoti's trial began on December 16, 1971, and ended on the following day. He was found guilty of seven separate contempts and sentenced to five terms of six months, one term of three months, and one term of twelve months, sentences to run consecutively. On January 5, 1972, the twelve-month sentence was reduced to six months.

Petitioner Langnes' trial began on December 17, 1971, but was continued to December 20, 1971, after appellant seized a microphone in front of him and hurled it at the Court. He was found guilty of six separate contempts and received sentences of five terms of six months and one term of two months, to run consecutively.

E. The Second State Court Appeal.

On January 17, 1972, petitioners, along with co-defendant Mayberry, again appealed their contempt convictions to the Pennsylvania Supreme Court.

By an Order filed on July 2, 1973, the Pennsylvania Supreme Court affirmed the lower court's judgment of sentence. Justice Manderino filed a dissenting opinion on the basis of *United States v. Seale,* 461 F.2d 345 (7th Cir. 1972). *Commonwealth v. Mayberry,* 453 Pa. 619, 306 A.2d 294 (1973).

A Petition for Writ of Certiorari to your Honorable Court was docketed on October 4, 1973. Respondent received notice that the petition had been docketed on October 29, 1973, and thereafter filed an answer to the Petition. On December 3, 1973, this Honorable Court granted the Petition limited to the two questions discussed herein.

ARGUMENT

I. The individual contempt sentences must be used rather than the total effective sentence received in order to determine the seriousness of the contempts and thereby determine the right to jury trial when the sentences for direct criminal contempt of court are imposed at the end of a trial.

Petitioners argue that they were entitled to a jury trial on their contempt charges on the basis that the sentences which they received on the different charges should be aggregated so as to exceed six months. They contend that to not aggregate the sentences is an unnecessary extension of judicial contempt power and that their separate offenses should be viewed as one continuing "serious offense." With this rationale, the Commonwealth must disagree.

A defendant's right to a jury trial for a "serious offense" was established by your Honorable Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968). The exact definition of what constituted a serious offense was unclear until *Baldwin v. New York*, 399 U.S. 66 (1970), which held that, for purposes of the right to trial by jury, a serious offense is one "where imprisonment for more than six months is authorized." Where there is no statutory authorization of a maximum sentence for the crime, the Court held that the criterion that must be examined to test for seriousness is the length of the sentence which the lower court actually imposed. *Bloom v. Illinois*, 391 U.S. at 211; *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). *Frank v. United States*, 395 U.S. 147 (1969).

In the instant case, in response to the remand by your Honorable Court,[1] petitioners were tried and found guilty of various contempt charges and ultimately sentenced to six months or less on each charge. Petitioners now argue that the sentence received for their separate adjudications of contempt should be combined to artificially create a single offense. This "imaginary" offense would then require a jury trial. The Commonwealth submits that your Honorable Court purposely chose the seriousness of the crime as the controlling standard—in this case determined by the actual sentences imposed. Application of the federal standard was never meant to depend on the happenstance of the number of separate crimes that were, by chance, combined in a single trial for purposes of expediency.[2]

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[1] See *Mayberry v. Pennsylvania, supra.*

[2] See *City of Monroe v. Wilhite*, 225 La. 838, 233 So. 2d 535, *cert. denied* 400 U.S. 910 (1970) where the defendant had been charged in two separate affidavits with driving while intoxicated and speeding,

(Footnote continued on following page)

Prior to its decision in the instant case, the Pennsylvania Supreme Court dealt with this specific issue in *Commonwealth v. Snyder*, 443 Pa. 433, 275 A.2d 312 (1971). There the Pennsylvania court unanimously held that the defendant was not entitled to a jury trial when two separate criminal contempts were tried together at the conclusion of defendant's trial and the defendant was sentenced to three months on the first citation and six months on the second citation. As the Pennsylvania criminal contempt statute does not provide a maximum term from which the "seriousness" of the offense can be judged, the Pennsylvania Court in *Snyder*, following *Bloom v. Illinois, supra*, looked to the actual sentence imposed and found that neither sentence exceeded the more than six month standard established in *Baldwin v. New York, supra*, and therefore a jury trial was not required.[3]

Petitioners argue that the present state of the law of Pennsylvania which does not allow aggregation of sentences to determine the seriousness of the offenses is an

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(Footnote continued from preceding page)
both offenses arising out of the same act. Each offense carried a maximum penalty of six months in jail and/or a $500.00 fine. The two offenses were consolidated for trial and the defendant raised the question of his right to a jury trial on the basis of the aggregated possible maximum of one year in jail and a $1,000.00 fine. The Supreme Court of Louisiana held that aggregation was not required in order to determine the defendant's right to a jury trial. This court denied the defendant's petition for certiorari. See also *State v. James*, 76 N.M. 416, 419-420, 415 P. 2d 543, 546 (1966); *Scott v. District of Columbia*, 122 A.2d 579, 581 (D.C. Ct. App. 1956) and *United States v. Merrick*, 459 F.2d 644 (4th Cir. 1972).

[3] Although *Synder's* holding was rejected in *United States v. Seale, supra*, relied upon by petitioners, other jurisdictions have by way of dicta assumed a position on the same issue consistent with *Snyder*. See *e.g. Wiess v. Superior Court*, 106 Ariz. 577, 579, 480 P.2d 3, 5 (1971), *State v. Koscot Interplanetary Inc.*, 69 Misc. 2d 421, 330 N.Y.S. 2d 492 (Sup. Ct. 1972).

unnecessary extension of judicial contempt power. Petitioners' argument carries little weight in light of the fact that, as recently as nine years ago, the crime of criminal contempt was considered summary in nature and a person charged with criminal contempt did not have a constitutional right to a jury trial. *United States v. Barnett*, 376 U.S. 681 (1964), rehearing denied 377 U.S. 973. Furthermore, the courts historically have had extensive power to sentence a defendant for contempt during trial. It is inaccurate and misleading to label the present state of the law in Pennsylvania an "extension" of judicial contempt power.

The Court in *United States v. Seale, supra*, would seem to make a distinction regarding the so-called aggregation rule where the trial judge immediately cites and sentences a contemptuous defendant as opposed to a post-trial hearing on the contemptuous acts on the basis of a potential for judicial abuse of the contempt power that is greater at the post-trial stage.[4]

While the court in *Seale* contended that where a judge reserves sentencing until the end of trial, the defendant should have the right to a jury trial as a protection against the arbitrary exercise of official power, the court also recognized the necessity for a judge to be able to cite and punish contempt immediately upon its occurrence without regard for whether the aggregate of the sentence is imposed exceeds six months. This anomalous position was

[4] Subsequent to *Seale* Judge Cummings, in *In re Chase*, 468 F.2d 128 (7th Cir. 1972) spoke again to the distinction for aggregation of sentences and the right to a jury trial purposes of immediate during trial citation and sentencing for contempt and the post-trial procedure in *Seale* and held non-aggregation to be the rule when immediate or periodic citation and sentencing is carried out. However, Judge Cummings stated also that immediate citing and sentencing ". . . may still deny the contemnor a jury trial if it oppressively converts a single continuing offense into a series of individual ones." 481 F.2d at 135.

explained by the contention that here is a greater opportunity for abuse of discretion when the judge waits until the end of trial to sentence for contempt than when the judge sentences for contempt immediately upon its occurrence. Furthermore, the *Seale* court made this contention in apparent disregard of the safeguard required by your Honorable Court that a trial judge must refer sentencing to another judge when sentencing is reserved until the end of trial. *Mayberry v. Pennsylvania, supra.*

The curious position assumed by the Seventh Circuit ignores the fact that the greater opportunity for abuse of discretion does not lie at the end of trial when tempers have cooled. On the contrary, the greater opportunity for abuse of discretion exists during the trial when the trial judge is under stress. That this is the more accurate view of the situation is impliedly recognized by a trial judge when he wisely reserves sentencing until the end of the trial so that he or another judge may review the record insulated by time from the emotions generated in the courtroom.

The foundation for the Seventh Circuit Court's decision was laid in *Mayberry v. Pennsylvania, supra,* where your Honorable Court determined that, where a judge reserves sentencing until the end of trial, another judge "not bearing the sting of these slanderous remarks and having the impersonal authority of law" should sit in judgment on the record. The *Mayberry* decision was an attempt to honor two important principles, to wit, that a judge should retain the power of cite and sentence for contempt *sua sponte* in order to preserve order in the courtroom and that if the opportunity avails itself, it is desirable for another less impassioned judge to sit in judgment and sentence the defendants for their conduct. While this decision has

obvious merit, it must be limited in scope and cannot serve as a basis judicial extensions such as proposed by the petitioners. The Commonwealth submits that adopting the rule of aggregation of sentences proposed by the petitioners would be tantamount to forcing a judge to cite and sentence a defendant immediately upon the occurrence of a contemptuous action when passions are at their most extreme. Such a rule would not be in the interests of justice.

The Commonwealth recognizes that a lower court might escape the effect of the rule by trying each contempt citation separately. Such would be a wasteful procedure, however, both in terms of the judge's time and the expense involved in separate trials.

Some courts would seem to distinguish aggregation of sentences for a required jury trial where several "petty" offenses arise out of the "same setting".[5] However, the Commonwealth would submit that the instant case reveals several separate and distinct acts of contempt on the part of the petitioners occurring during a trial lasting twenty-two days. An examination of the citations involved shows that the several separate contemptuous acts took place on various dates throughout the trial (App. 30-34). The Commonwealth is unable to characterize the contempts by the petitioners in the instant case as one continuing course

[5] *State v. Owens*, 54 N.J. 153, 254 A.2d 97 (1969) *cert. denied* 396 U.S. 1021 (1970). In *Owens*, where several assault and battery charges arose out of a single event (police officers responding to a domestic disturbance) the New Jersey Court found a jury trial "relevent." In *United States v. Potvin*, 481 F.2d 380 (10th Cir. 1973) the defendants were charged with two petty offenses arising out of their act of building a lean-to and tepees on the lands of the United States without a permit and cutting trees for that purpose. In aggregating the possible sentence and determining whether the defendants therefore had a right to a jury trial, the court based its decision on the fact that the offenses arose "out of the same act, transaction, or occurrence" 481 F.2d at 382.

of behavior as the Seventh Circuit was able to characterize the conduct involved in *Seale*.[6]

Petitioners' contention that contempt offenses arising from the same trial must be treated as one continuous offense is not persuasive. When a judge cites a defendant during trial, he is making a finding of fact that the defendant's actions constitute contempt of court. The only remaining determination to be made is the appropriate sentence to be imposed for each offense. The mere fact that a judge reserves sentencing until the end of trial should not logically change the fact that each contempt is a separate and distinct offense.

The Commonwealth would agree with those commentators who have examined the decision in *Seale* and found it faulty in that the basic premise upon which the aggregation rule is laid is inconsistent with the American concept of the judiciary and right of appellate review.[7] The *Seale* aggregation rule rationale seems to imply a presumption of abuse of the contempt power on the part of American trial judges and a further inability on the part of appellate courts to discover and correct abuses of sentencing.[8] The Commonwealth would assert that although a single test for determining separability of offenses is impossible due to the multitude of possible variations in conduct, appellate courts are often called upon to review alleged abuses of discretion and questions of factual separability regarding contemptuous conduct is equally conducive to appellate review.[9]

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[6] 461 F.2d at 354, n. 12.

[7] Thompson and Starkman, *Multiple Petty Contempts and the Guarantee of Trial By Jury*, 61 Geo. L.J. 621, 649-650 (1973).

[8] *Id.* at 650.

[9] *Id.* at 650.

Further, the distinction drawn by the court in *In re Chase, supra,* regarding possible transformation of a continuous act into a series of separate contempts will require the very appellate review of separability of acts that the court sought to eliminate in its own decision in *United States v. Seale, supra.* Thus if the appellate courts are presumed to be capable of examining a record to determine whether the trial judge converted a single act into a series of contempts by his actions during trial, they would seem equally capable of examining post-trial proceedings.[10]

Also of note in the *Seale* rationale is the possibility of incongruous results depending upon whether the contemnor is attorney or client. The Commonwealth therefore submits that consistent results can only be obtained in contempt cases by eliminating the aggregation rule altogether in light of the strong need for a trial court to be able to proceed immediately on direct criminal contempts in its presence.[11] See *Illinois v. Allen,* 397 U.S. 337, 344 (1970).

For the above-stated reasons the Commonwealth would submit that the aggregation rule as proposed by the petitioner and the Court in *United States v. Seale, supra,* is not constitutionally required and therefore the petitioners were not denied due process of law when they were sentenced on several distinct criminal contempts in a non-jury post-trial proceeding.

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[10] *Id.* at 651.

[11] *Id.* at 652.

II. The strong possibility of a substantial term of imprisonment does not require that an accused be afforded the right to a jury trial.

Petitioner argues that *Baldwin v. New York, supra* is dispositive of this issue. *Baldwin* addressed itself to resolving the dichotomy between "petty" and "serious" offenses for purposes of the Sixth Amendment, right to jury trial provision. This Court specifically concluded "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment *for more than six months is authorized.*"[12] (Emphasis added) In ordinary criminal prosecution, the severity of the penalty authorized was the standard used to determine the "seriousness" of the offense. *Duncan v. Louisiana, supra; Frank v. United States, supra.* Thus, *Baldwin* served as a further refinement to this troublesome problem.

The Commonwealth submits that *Baldwin* was not intended to reach the situation wherein no statutory penalty for an offense was proscribed. In this situation, the criterion upon which the classification depended, remained unchanged. Courts, including those of Pennsylvania, continued to look to the severity of a penalty actually imposed.[13] *Cheff v. Schnackenberg, supra; Bloom v. Illinois, supra; Frank v. United States, supra.* Thus, the Commonwealth contends that *Baldwin* is distinguishable from the instant facts and is not responsive to the issue now before the Court.

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[12] 399 U.S. at 69.

[13] *Weiss v. Superior Court, supra; State v. Dostal,* 28 Ohio St. 2d 158, 277 N.E. 2d 211 (1971), *cert. denied,* 406 U.S. 831 (1972); *Roselle v. Oklahoma,* 503 P.2d 1293 (1972); *McGowan v. Mississippi,* 258 So. 2d 801, *cert. denied,* 409 U.S. 1006 (1972); *Commonwealth v. Snyder, supra;* Contra, *Sarich v. Havercamp,* 203 N.W. 2d 260 (1972); *Alaska v. Browder,* 486 P.2d 925 (1971).

Indeed, there also appears to be some question as to the applicability, if any, of Baldwin to the direct criminal contempt situation.[14]

The Commonwealth further raises for your Honorable Court's consideration the question of whether *Baldwin* should be applied retroactively to the instant case. The Commonwealth relies upon the rationale of *Jenkins v. Delaware*, 395 U.S. 213 (1969). There the petitioner was originally tried on January 13, 1966. At trial, an incriminating statement of the petitioner was admitted into evidence. While this case was on appeal, *Johnson v. New Jersey*, 384 U.S. 719 (1966) and *Miranda v. Arizona*, 384 U.S. 436 (1966) were decided. The Delaware Supreme Court reversed the conviction on various state grounds and also determined that under *Johnson*, petitioner's statement which was obtained without advising him of his constitutional rights, would be admissible at his retrial. The rationale was that a retrial is not the "commencement" of a case but is a mere "continuation" of the case originally commenced. Your Honorable Court affirmed. In the instant case, the original trial took place in December 1966 and the Supreme Court of Pennsylvania rejected petitioner's claim as to right to trial by jury on the basis of *DeStefano v. Woods*, 392, U.S. 631 (1968) which held that *Duncan* and *Bloom* are prospective only, 434 Pa. 478, 255 A.2d 131 (1969); in *Mayberry v. Pennsylvania, supra*, this Court reversed on grounds unrelated to *Baldwin* and remanded so that "another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record." The Commonwealth contends that the proceedings pursuant to the order were a

[14] *State v. Dostal, supra; Commonwealth v. Snyder, supra.*

"continuation" of the original case rather than an entirely new, separate and distinct trial; the proceedings constituted a "resentencing" of the petitioner and not a new adjudication of guilt. With this view of non-retroactivity for *Baldwin*,[15] it would then be consistent with the holding in *DeStefano, supra.*

Whether the courts may adjudicate criminal contempt cases without a jury trial has been a recurring question. The history surrounding this problem need not be set forth herein. The Pennsylvania statute authorizing imprisonment for contempt does not provide a limitation on the length of imprisonment which may be imposed. Act of 1836, June 16, P.L. 784 § 23, 24, 17 P.S. § 2041, 2042.[16] In

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[15] Courts confronted with this issue have found the decision to so affect the administration of justice to require non-retroactive application. *United States ex rel. Farmer v. Kosan,* 440 F.2d 1256 (2d Cir. 1971); *People v. Dargan,* 26 N.Y. 2d 100, 261 N.E. 2d 633, 313 N.Y.S. 2d 712 (1970); *State v. Dostal, supra.* However, in *Commonwealth v. Bethea,* 445 Pa. 161, 282 A.2d 246 (1971), the Pennsylvania Supreme Court with two judges filing concurring and dissenting opinions and one judge not participating, decided without explanation that *Baldwin* was retroactive. The dissenting opinions echo the views of the aforementioned cases. The Commonwealth views the majority opinion as patently erroneous.

[16] CLASSIFICATION OF PENAL CONTEMPTS.

The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases, to-wit:

I. To the official misconduct of the officers of such courts respectively;

II. To disobedience or neglect by officers, parties, jurors, or witnesses of or to the lawful process of the court;

III. To the misbehavior of any person in the presence of the court, thereby obstructing the administration of justice. 1836, June 16, P.L. 784, § 23.

PUNISHMENT FOR CONTEMPT.

The punishment of imprisonment for contempt as aforesaid shall extend only to such contempts as shall be committed in open court, and all other contempts shall be punished by fine only. 1836, June 16, P.L. 784, § 24. See *Duncan v. Louisiana, supra,* N. 35 at 162. *Frank v. United States, supra.*

this instance, the generally accepted test is to look to the severity of penalty actually imposed and sentences in excess of six months may not be given without the imposition of a jury trial or waiver thereof. *Cheff, supra; Bloom, supra.* However, both of these cases involved indirect criminal contempt and disputed issues of fact necessitated extended hearings.[17] The instant case presents the classic form of direct criminal contempt. Nevertheless, the Commonwealth urges that the principles of *Cheff* and *Bloom* be applied to the instant case as has been done on the State level.[18] Thus, though the statute in question is open ended in terms of potential punishment, in a practical sense, an accused cannot receive a sentence in excess of six months without a jury trial. The Commonwealth concedes that had the petitioner been given a sentence in excess of six months, a jury trial would have been required. The Commonwealth equates the phrase "substantial term of imprisonment" to a period in excess of six months thereby preserving the distinctions between "petty" and "serious" offenses this Court made in *Baldwin* with respect to ordinary crimes. If an accused faces a lengthy term of imprisonment, something in excess of six months, under the statute in question, it is not because the statute lacks a maximum proscribed sentence but because the trial judge or appellate court upon review deems the contumacious conduct as serious. To interpose the requirement of a jury trial simply because the statute is open ended as to punishment would destroy the fundamental nature of a

[17] *Cheff* failed to obey an order by an appellate court directing compliance with a cease and desist order of the Federal Trade Commission; *Bloom* was convicted on centempt for willfully petitioning to probate a fraudulently prepared and executed will.

[18] *Commonwealth v. Snyder, supra; Commonwealth v. Patterson,* 452 Pa. 457, 308 A.2d 90, 93 n. 3 (1973).

contempt proceeding.[19] The contempt offense would take on the character of an ordinary crime with its attendant purpose of punishing past wrongful conduct. Contempt must remain a tool to be used to maintain courtroom decorum. Whether a trial judge cites a contemnor at the time of the occurrence or waits until the end of trial must be determined on a case-by-case basis. In the instant case, it should be pointed out that the petitioner acted as his own counsel and the trial judge may very well have concluded that to have cited and sentenced as the contempts occurred would have had the effect of prejudicing the case in chief. On the facts of this case, the trial judge may not have had any other alternative than cite for contempt at the conclusion of the trial. Naturally, the benefits of *Illinois v. Allen*, 397 U.S. 337 (1970) were not available.

Mr. Justice White, speaking for the court in *Bloom*, expressed considerable apprehension about the unbridled power to punish summarily for contempt. The Commonwealth submits that while these fears were viable prior to *Bloom*, subsequent decisions have arrested them. *Illinois v. Allen, supra*, provides vital options for the trial judge to employ during the course of trial. *Mayberry* provides protection to defendants in cases of severe villification who may be cited at the end of trial. Moreover, matters of "discreteness" or abuse are properly reviewable before the appellant courts. *Yates v. United States*, 355 U.S. 66 (1957) demonstrates that reviewing courts will not tolerate "caprice" in dealing with contempts. Thus, in the

[19] See Thompson and Starkman, *Multiple Contempts and the Guarantees of Trial by Jury, supra*, at 631-635 for discussion of the practical difficulties inherent in having a jury trial on direct criminal contempt.

light of such safeguards, further limitation to the contempt power is unnecessary and unwarranted.

For the foregoing reasons, the Commonwealth respectfully urges the Court to deny the relief requested.

Conclusion

WHEREFORE, for the above-stated reasons, respondent respectfully requests that the relief requested be denied.

Respectfully submitted,

ROBERT W. DUGGAN,
District Attorney of Allegheny County,
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